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U.S. SUPREME COURT

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 335

HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN
LEWIS TILLER, DECEASED,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

J. VAUGHAN GARY,

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Counsel for Petitioner.

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CORPORATION,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.**

*To the Honorable the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:*

Hattie Mae Tiller, Executor of the Estate of John Lewis Tiller, deceased, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in this case on May 15, 1944.

A.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 15, 1944 (R. 208). The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A. Sec. 347 (a).

B.

Statement of the Matter Involved.

This case is now before this Court for the second time, having been previously heard in 1943 (*Tiller v. Atlantic Coast Line* (1943), 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610). It involves a suit for damages instituted under the provisions of the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, *et seq.*, by Hattie Mae Tiller, the widow and executrix of John Lewis Tiller, employed by Atlantic Coast Line Railroad Company as a sergeant of police, for his death while engaged in the performance of his duties in the Clopton freight yard of the company near Richmond, Virginia, which she alleges resulted from the negligence of the railroad company.

The Circuit Court of Appeals has found that the evidence warrants the inference that the accident occurred under the following circumstances: Every evening the carrier operated a freight train from Richmond to the South which was made up at Clopton Yard. Tiller had been a member of the Railroad Police Force for sixteen years and for a number of years had been assigned to the protection of this train. He was engaged in this work about 7 P. M. on March 20, 1940, when he was hit by the lead-car of three cars that were being pushed in a northerly direction by the road engine in a slow back-up movement in the course of shifting operations. The tracks ran north and south at the point of the accident and Tiller was standing between two of the tracks, or on the more westerly of the two tracks, while using a flashlight to examine the seals on the doors of the cars on the track to the east without observing that the three cars in the back-up

movement were approaching him on the track to the west. The night was dark and the yard was unlighted. The locomotive that was pushing the cars that injured Tiller had no light on its rear end other than a small electric bulb situated on the top of the tender below the top of the cars that were being pushed. There was no light on the head car of the back-up movement except that a brakeman holding a lighted lantern was riding on the step at the northwest corner of the car in order to protect a cross highway known as Clopton Road which the cars were about to cross. He stepped off the west side of the car before its east side struck Tiller.

When the case was first tried in the United States District Court, at the conclusion of plaintiff's evidence, the Court directed a verdict for the defendant. On appeal, the Circuit Court of Appeals for the Fourth Circuit affirmed the decision. This Court, on review, holding that the question of negligence on the part of the railroad and on the part of the employee should have been submitted to the jury, reversed the decision of the Circuit Court of Appeals and remanded the case for further proceedings.

The original complaint filed by petitioner contained both general and specific allegations of negligence (R. 1). After the case was remanded to the District Court, the petitioner, with leave of court, filed (R. 5) an amended complaint (R. 7) amplifying the particulars of negligence contained in the original complaint by adding thereto an allegation that the defendant had violated the provisions of the Federal Boiler Inspection Act, 45 U. S. C. A., Sec. 22, *et seq.*, by using or permitting to be used a locomotive which was in improper condition and unsafe to operate in the service, and the condition of which constituted unnecessary peril to life and limb, in that it did not have the proper lights, and that defendant had also violated the rules and regulations prescribed by the Interstate Commerce Commission pursuant

to the provisions of the said Boiler Inspection Act, in that it used a locomotive in yard service between sunset and sunrise which did not have the proper lights as prescribed by the said rules.

The case was tried in the District Court on the amended complaint. The evidence introduced at this second trial in the District Court, insofar as it pertained to the allegations of negligence contained in the original complaint, was practically identical with that introduced at the first trial. The evidence presented at the former trial tending to show that the train which struck Tiller was engaged in an unusual and unexpected movement which entitled him to adequate warning thereof, was tremendously strengthened by the presentation of testimony from additional qualified witnesses who did not testify at the first trial. In addition, the petitioner proved that the defendant had violated Rule 131 of the Interstate Commerce Commission promulgated pursuant to the provisions of the Federal Boiler Inspection Act, in that the locomotive which caused the death of Tiller was a locomotive used in yard service between sunset and sunrise and that it did not have a light on its rear end which would enable a person in its cab who possesses the usual visual capacity required of locomotive enginemen to see in a clear atmosphere a dark object as large as a man of average size standing erect at a distance of at least 300 feet ahead and in front of such light, as prescribed by the said rule. The case was submitted to the jury by the District Court on the question of negligence on the part of the railroad and on the part of the employee, as prescribed by this Court (R. 180). The jury returned a verdict in favor of the plaintiff (R. 191). The court overruled a motion of the defendant to set aside the verdict and entered judgment for the plaintiff.

On appeal, the Circuit Court of Appeals for the Fourth Circuit reversed the decision of the District Court and ordered the case remanded for a new trial on the ground that

defendant's violation of Rule 131 of the Interstate Commerce Commission had no causal connection with Tiller's death, because even if the locomotive in question had been equipped with a light as required by the Rule, the light would have been obscured by the cars which the locomotive was pushing and would not have prevented the accident and that, therefore, this issue should have been withdrawn from the jury. The court held that, although the evidence at the second trial in respect to the movement of the cars was substantially the same as at the first, it was not bound by the former decision of this Court because the plaintiff had specified the violation of Rule 131 as a new item of negligence, which was submitted to the jury as an alternative ground for recovery, and that, since the verdict was general, it was impossible to say whether it was based upon the issue properly submitted to the jury or upon the issue that should have been withdrawn.

The court further held that, although there was substantial evidence to show that the train which caused the death of Tiller was engaged in an unusual and unexpected movement, under the circumstances involved the railroad owed no duty to give a special warning to him.

C.

Questions Presented.

1. Whether a general verdict should be upheld in a case involving two or more issues or theories, when one issue or theory has been properly submitted to the jury and is sustained by the evidence.

2. Whether a railroad, by adopting a certain practice in operating its trains, can nullify a rule of the Interstate Commerce Commission promulgated under the provisions of the Federal Boiler Inspection Act for the safety of the employees of the railroad.

3. Whether there was sufficient evidence to justify the submission of the question of the violation of Rule 131 of the Interstate Commerce Commission to the jury over the defendant's objection.

4. Whether there was sufficient evidence of a causal connection between defendant's violation of Rule 131 of the Interstate Commerce Commission and Tiller's death to justify submission of that question to the jury over defendant's objection.

5. Whether the question as to defendant's duty to give Tiller adequate warning because of the unusual and unexpected movement of the cars that struck him was properly submitted to the jury.

D.

Reasons Relied On for Allowance of Writ.

1. The United States Circuit Court of Appeals for the Fourth Circuit has decided an important question of Federal Law which has not been, but should be, settled by this Court, and has decided the same in a way probably in conflict with applicable decisions of this Court, namely, that a railroad, by adopting certain practices, may nullify a rule of the Interstate Commerce Commission promulgated pursuant to the provisions of the Federal Boiler Inspection Act for the protection of the employees of the railroad.

2. The United States Circuit Court of Appeals for the Fourth Circuit has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, namely, that a general verdict cannot be upheld in a case in which there are two or more issues or theories when one issue or theory has been properly submitted to the jury and is sustained by the evidence if, in the opinion of the

court, another issue or theory has been improperly submitted to the jury and should have been withdrawn.

3. Petitioner, whose husband has suffered death from the negligence of the defendant, has pursued her quest for damages, to which she and her son are entitled under the Federal Employers' Liability Act, for nearly five years, through two jury trials and three appellate trials. A jury to whom her case was fairly and properly submitted in accordance with the decision of this Court has returned a verdict in her favor, to which she is justly entitled. If the decree of the Circuit Court of Appeals is permitted to stand, she will be forced into a third jury trial in which the issue will be improperly restricted and in which she will be at a decided disadvantage.

A supporting brief accompanies this petition.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Fourth Circuit entered by that court in this case on May 15, 1944, and that the said order be reversed by this Honorable Court, and that your petitioner may have such other and further relief as this Honorable Court may deem proper.

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DAVE E. SATTERFIELD, JR.,

Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 335

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JOHN LEWIS TILLER, DECEASED,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

I.

Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals, Fourth Circuit (R. 200), is reported in 142 F. (2d) 718. The District Court of the United States for the Eastern District of Virginia did not deliver a written opinion. A memorandum opinion of the court on the question of the amendment of the complaint appears on page 13 of the Record and its final judgment on page 197.

II.

Jurisdiction.

The jurisdiction of this case is invoked under Sec. 240 (a) of the Judicial Code, as amended, 28 U. S. C. A., Sec. 347 (a). The judgment of the United States Circuit Court of Appeals, Fourth Circuit, to be reviewed was entered on May 15, 1944 (R. 208).

III.

Statement of the Case.

A statement of the case appears under heading "B" of the Petition for Writ of Certiorari. In the interest of brevity, that statement is not now repeated, but is referred to, with the request that it be considered as here incorporated by reference.

IV.

Questions Presented.

The questions specifically brought forward by the Petition for Writ of Certiorari appear under heading "C" of the petition. Again, in the interest of brevity, they are not now repeated, but are referred to, with the request that they be considered as here incorporated by reference.

V.

ARGUMENT.**Summary of Argument.**

1. This Court has held that the evidence in this case is sufficient to support the verdict of the jury on one issue which was properly submitted. The verdict should, therefore, be upheld, even though another issue may have been improperly submitted.

2. The issue relating to plaintiff's right of recovery because of defendant's violation of Rule 131 of the Interstate Commerce Commission was properly submitted to the jury and there is sufficient evidence to sustain a verdict founded thereon.

3. The District Court properly instructed the jury in that portion of its charge that related to the question whether the movement of the cars that struck Tiller was so unusual and unexpected that it became the duty of the defendant to give him an adequate warning of their approach and there is sufficient evidence to sustain a verdict founded thereon.

1. The verdict of the jury should be upheld on issue properly submitted.

This Court held in *Tiller v. Atlantic Coast Line* (1943), 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, that the evidence presented during the first trial of this case was sufficient to sustain a verdict of negligence against the defendant, and that the question of negligence should, therefore, have been submitted to the jury. There was practically no change in the evidence presented during the second trial in the District Court on the original allegations of negligence. It is rather remarkable that in these uncertain times it was possible to assemble for the second trial the same witnesses who testified at the previous trial two years earlier and that their testimony varied so little after the expiration of two years.

The Circuit Court of Appeals concedes that the issue raised by this evidence was properly submitted to the jury and admits, although somewhat reluctantly, that had no other issue been raised, its duty to affirm the judgment, based upon the verdict, would have been clear under the previous decision of this Court. It holds, however, that

because the petitioner in the second trial alleged and proved, as an additional act of negligence, that the defendant violated the Federal Boiler Inspection Act and Rule 131 of the Interstate Commerce Commission promulgated pursuant thereto and, in the court's opinion, there was no causal connection between the violation of the rule and the death of Tiller, this issue was improperly submitted to the jury and the general verdict could not be upheld, as it was impossible to say whether it was based upon the issue properly submitted or upon the issue that should have been withdrawn. Authorities are cited to sustain this opinion.

It is respectfully submitted, however, that there is a decided conflict of authority upon the question as to whether error affecting only one of two or more issues is prejudicial. This Court in recent cases has apparently given tacit approval to the doctrine that if one issue is properly submitted to the jury and is sustained by the evidence, a general verdict should be upheld even though another issue may be improperly submitted. *Cross v. Ryan* (C. C. A. 7th, 1941), 124 F. (2d) 883, certiorari denied (1942), 316 U. S. 682, 62 S. Ct. 1269, 86 L. Ed. 1755; *Miller v. Advance Transp. Co.* (C. C. A. 7th, 1942), 126 F. (2d) 442, certiorari denied (1942), 317 U. S. 641, 63 S. Ct. 32, 87 L. Ed. 516.

Applying this rule to the instant case, if, as determined by this Court at the previous hearing, the evidence then presented was sufficient to justify the submission of the question of negligence to the jury on the issue presented by petitioner's original allegations, then the evidence is now sufficient to sustain the verdict of the jury on that issue which was properly submitted. The verdict should, therefore, be upheld, even though, as determined by the Circuit Court of Appeals, the other issue may have been improperly submitted.

2. Issue involving defendant's violation of Rule 131 was properly submitted to jury.

The Federal Boiler Inspection Act, 45 U. S. C. A., Sec. 22, et seq., was enacted according to its title "to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto." Section 2 of the said Act, 45 U. S. C. A., Sec. 23, reads as follows:

"Use of unsafe locomotives and appurtenances unlawful; inspection and tests.—It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The said law authorizes the Interstate Commerce Commission to prescribe rules and regulations governing locomotives, their equipment, boilers and appurtenances thereto.

In the case of *U. S. v. B. & O. Ry. Co.* (1935), 293 U. S. 454, 55 S. Ct. 268, Mr. Justice Brandeis, delivering the opinion of the Court, says on page 271:

"* * * Referring to the argument of the states 'that the authority delegated to the Commission does not extend to ordering the use or installation of equipment of any kind, *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419,' we said: 'The duty of the Commission is not merely to inspect.

It is also to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the Commission sets the standard. By setting the standard it imposes requirements. The power to require specific devices was exercised before the amendment of 1915, and has been extensively exercised since.' In closing the opinion, we added: 'If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample.' "

Pursuant to the provisions of the said law, the Interstate Commerce Commission has promulgated and published certain rules and instructions for the inspection and testing of steam locomotives and tenders and their appurtenances. Rule 131, prescribed by the Commission, which was in full force and effect at the time of employee Tiller's death, reads as follows:

"131. *Locomotives used in yard service.*—Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in rule 129, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition."

The rule of the Commission has the force and effect of a statutory provision and imposes upon the respondent a mandatory, absolute, unqualified and continuing duty to comply with its requirements. *Southern Ry. Co. v. Lunsford* (1936), 297 U. S. 398, 56 S. Ct. 504; *Napier v. Atlantic Coast Line* (1926), 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432; *B. & O. Ry. Co. v. Groeger* (1925), 266 U. S.

521, 45 S. Ct. 169; *Chesapeake & O. Ry. Co. v. Wood* (1932), 59 F. (2d) 1017.

The District Court instructed the jury that if it believed from the evidence that Tiller was struck, between sunset and sunrise, by a car which was being pushed by a locomotive being at the time used in yard service without a rear light as prescribed by Rule 131, and as a proximate result of such failure to have such a light on the rear of the locomotive Tiller received injuries from which he died, then it should return a verdict for the plaintiff. It is respectfully submitted that this was a correct statement of the law and that there is sufficient evidence to sustain the finding on that issue.

The Circuit Court of Appeals apparently concedes that Rule 131 was violated by the defendant, but bases its reversal of the case on the ground that there was no causal connection between the violation of the rule and the accident. The evidence shows that the darkness was an important factor in this case. The night was dark, the yard was unlighted, the rear end of the back-up movement was unlighted. The jury might well have believed that if the locomotive had carried the proper light, even though the light would have been obstructed by the cars which it was pushing, its beams would have been so diffused as to have attracted Tiller's attention, and that his death might have been averted.

It is indisputable that if the locomotive had been equipped with a rear light, as prescribed by Rule 131, and that light had not been obstructed by the cars placed in front of it, anyone maintaining a lookout in the cab of the locomotive could have seen Tiller and Tiller would certainly have seen the light and so his death would have been averted.

The Circuit Court of Appeals held that defendant's violation of Rule 131 was not the proximate cause of Tiller's death because, even if the locomotive had been equipped

with the proper light, it would have been obscured by the cars which it was pushing and would not have prevented the accident. This ruling rests upon the false premise that defendant had a right to obscure the light with cars. Rule 131 is a safety measure. The purpose of the light is to prevent accidents by disclosing objects on the track and by serving as a warning to persons in danger of the approaching locomotive. By what authority can the railroad so obscure the light as to totally nullify the purposes of the rule?

It has been held that even if an engine in yard service was equipped with lamps on the front and rear in good condition in compliance with the Boiler Inspection Act, failure of the railroad's servants to keep the lamp burning as the engine proceeded at night constituted negligence rendering the railroad liable for resulting injury sustained by a switchman. *Chesapeake & O. Ry. Co. v. Rich* (C. C. A. 6th, 1936), 81 F. (2d) 584, certiorari denied (1936), 56 S. Ct. 955, 298 U. S. 684, 80 L. Ed. 1404.

A practice of carriers to permit the headlight of a locomotive in yard service to be obscured by cars that it is pushing, according to the opinion of the Circuit Court of Appeals, provides the defendant with an excuse for non-compliance with the rule. This practice is set forth in a stipulation of counsel presented at the second trial in the District Court (R. 148), in which it was agreed that if officials of five railroads operating in and out of Richmond, who are familiar with the practices on their roads and generally prevailing throughout the southeast had been present, they would have testified as to the existence of certain practices on the part of the railroads. Counsel for the petitioner did not agree that these were proper practices and they certainly did not dream that the court would adjudge them paramount to Federal Statutes.

In fact, the defendant apparently has a very unsatisfactory record with respect to its practices. The Interstate Commerce Commission published on October 12, 1942, a Report on Reliability of Railroad Employee Accident Statistics based on an investigation conducted about the time of this accident, in which certain policies, practices and methods of the defendant company are specifically and strongly condemned. The report also discloses that the files of some of the railroads, among which defendant is inferentially included, were practically barren of anything related to accident prevention, and concludes that if such companies had devoted to accident prevention an amount of effort equal to that expended by them in finding some means by which a report of a particular accident could be avoided, such effort "might have led to the saving of many lives, as well as avoidance of injuries."

The Circuit Court of Appeals holds, in effect, that this practice of carriers to permit the headlight of a locomotive in yard service to be obscured by cars which it is pushing can nullify a rule of the Interstate Commerce Commission promulgated for the safety of the carriers' employees. If the carriers, by establishing this practice, can nullify the rule with respect to lights on locomotives, they can, by establishing other practices, nullify all safety rules. It is respectfully submitted that under the law railroads must conform their practices to Federal Statutes and rules promulgated pursuant thereto.

In the instant case the rule of the Interstate Commerce Commission said "let there be light"; the evidence shows that there was no light and that, largely because of the absence of light, Tiller was killed. These uncontroverted facts are sufficient to sustain the verdict on this issue.

3. There was no error in that portion of the District Court's charge relating to the unusual and unexpected movement of the cars that struck Tiller.

The Circuit Court of Appeals held that there was substantial evidence to support petitioner's contention that the cars which struck Tiller were being employed in an unusual and unexpected movement at the time of the accident. The District Court charged the jury, in substance, that if they believed that the back-up movement was an unusual and unexpected one and a departure from the general practice in making up the particular train, and that Tiller had no reasonable cause to believe that such a movement would be made, it became the duty of the defendant to give him adequate warning of the movement and if the jury found that the defendant failed to perform this duty and as a proximate result of such failure Tiller was injured, the jury should find a verdict for the plaintiff. It is respectfully submitted that this was a correct statement of the law. *Toledo, St. L. & W. R. Co. v. Allen* (1928), 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513; *Chesapeake & O. Ry. v. Peyton* (C. C. A. 4th, 1918), 253 F. 734.

The Circuit Court of Appeals determined that because there was no rule or custom which prohibited such a movement and the evidence showed that the same movement had been performed in the assembly of this nightly train on other occasions and that the track was in general use and was used for back-up movements for other purposes, the railroad owed no duty to give a special warning to Tiller and the District Court's instruction should not have been given. A careful reading of the record will show that the evidence as to previous similar movements, the general use of the track which was a siding and its use for back-up movements for other purposes was negligible.

Moreover, while evidence of this nature might be used to controvert the contention that the movement was unusual and unexpected, it would not change the defendant's duty to give adequate warning if the fact of the unusual and unexpected movement is proven as in this case.

Nor does the defendant's duty to give adequate warning of an unusual and unexpected movement depend upon a rule or custom prohibiting the movement. It rests upon a well-recognized principle of substantive law. The Circuit Court of Appeals has evidently confused the unusual movement doctrine with the doctrine which involves the violation of a rule, regulation or custom established by the employer.

The doctrine involving the unusual movement of trains in railroad yards is based upon the theory that, although a regular employee in the yards is presumed to have knowledge of the usual and ordinary movements of trains and, therefore, prior to the previous decision of this Court in this case, assumed the risk of such movements, even if negligently performed, when he was exposed to unusual danger by reason of an unusual or unexpected movement or a departure from the practice generally followed, the risk was not assumed and an obligation rested upon the employer to give him warning. Neither *Toledo v. Allen*, *supra*, *Chesapeake & O. Ry. v. Peyton*, *supra*, nor any other decisions dealing with this principle suggests that the evidence must show the violation of a rule or custom as a prerequisite to recovery. It is respectfully submitted that there was no error in the submission of this issue.

Conclusion.

In conclusion, counsel for the petitioner respectfully submit that, for the reasons herein set forth, a writ of certiorari should be granted the petitioner, and that this

Court should review and reverse the decision of the United States Circuit Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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(3264)

